Supreme Court, U.S.
FILED
DEC 12 1997
CLERK

No. 97-569

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLINGTON INDUSTRIES, INC.,

Petitioner,

v.

KIMBERLY B. ELLERTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

JAMES J. CASEY*
MARY MARGARET MOORE
**Counsel of Record*
ROSS & HARDIES
150 N. Michigan Avenue
Chicago, Illinois 60601
(312) 558-1000

TABLE OF CONTENTS

REASONS FOR GRANTING THE WRIT 1

I. THE AUTHORITIES CITED IN THE PETITION ESTABLISH THAT A CIRCUIT SPLIT EXISTS REGARDING THE ELEMENTS OF *QUID PRO QUO* SEXUAL HARASSMENT 1

II. APPLICATION OF A STRICT LIABILITY STANDARD IN *QUID PRO QUO* SEXUAL HARASSMENT CASES CONFLICTS WITH MERITOR 3

CONCLUSION 6

TABLE OF AUTHORITIES

Page

Cases

Chamberlin v. 101 Realty, Inc.,
915 F.2d 777 (1st Cir. 1990) 3

Ellert v. University of Texas, at Dallas,
52 F.3d 543 (5th Cir. 1995) 3

Hicks v. Gates Rubber Co.,
833 F.2d 1406 (10th Cir. 1987) 3

Kauffman v. Allied Signal, Inc.,
970 F.2d 178 (6th Cir.),
cert. denied, 506 U.S. 1041 (1992) 2

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57 (1986) 3, 4, 5

Nichols v. Frank,
42 F.3d 503 (9th Cir. 1994) 3

Robinson v. City of Pittsburgh,
120 F.3d 1286 (3d Cir. 1997) 3

Sparks v. Pilot Freight Carriers, Inc.,
830 F.2d 1554 (11th Cir. 1987) 3

Spencer v. General Elec. Co.,
894 F.2d 651 (4th Cir. 1990) 2

Other Authorities

Restatement (2d) of Agency 3, 4, 5

PETITIONER'S REPLY BRIEF

Petitioner Burlington Industries, Inc. ("Burlington") respectfully submits its reply brief in support of its petition for a writ of certiorari to review the judgment and opinion of the United State of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I. THE AUTHORITIES CITED IN THE PETITION ESTABLISH THAT A CIRCUIT SPLIT EXISTS REGARDING THE ELEMENTS OF *QUID PRO QUO* SEXUAL HARASSMENT

In her brief in opposition to Burlington's Petition, respondent Kimberly B. Ellerth ("Ellerth") attempts to conceal the existence of a conflict among the circuit courts of appeal regarding whether a plaintiff proceeding under a *quid pro quo* theory of sexual harassment must establish that the harassment affected tangible aspects of her employment by mischaracterizing the holdings of the cases cited in Burlington's petition. Specifically, Ellerth incorrectly states that the First, Fourth, Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have held that a plaintiff may state a claim for *quid pro quo* sex harassment merely by alleging that job benefits or detriments were conditioned upon submission to a supervisor's sexual advances. In fact, these circuits have required that the plaintiff also prove that she suffered tangible job-related detriments due to her refusal to submit to the advances. Consequently, these courts are in conflict with the Third and Ninth Circuits, as well as with the Seventh Circuit's holding in this case.

For instance, Ellerth cites Spencer v. General Elec. Co., 894 F.2d 651 (4th Cir. 1990), as holding that a claim of *quid pro quo* sexual harassment is stated whenever "sexual consideration is demanded in exchange for job benefits." (Opp.[1] at 19) Ellerth completely ignores that portion of Spencer which holds that the plaintiff must additionally prove that "[t]he employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions or privileges of employment." 894 F.2d at 658. Moreover, the court in Spencer required the plaintiff to provide evidence that her refusal to submit to her supervisor's sexual advances caused her to be passed over for raises and promotions in order to make out a *prima facie* case of *quid pro quo* sexual harassment. Id. at 659.

Ellerth also erroneously cites Kauffman v. Allied Signal, Inc., 970 F.2d 178 (6th Cir.), cert. denied, 506 U.S. 1041 (1992) for the proposition that a plaintiff need show only that submission to a supervisor's unwelcome sexual advances is made a condition of receipt of job benefits in order to state a *quid pro quo* claim. (Opp. at 18) In fact, the Sixth Circuit in Kauffman held that the plaintiff's allegations that her supervisor assigned her to a broken piece of equipment because she refused to expose her breasts to him did not state a claim under a *quid pro quo* theory because she had not proven that the harassment affected tangible aspects of her employment. 970 F.2d at 187.

Ellerth's brief in opposition likewise misstates the holdings of Chamberlin v. 101 Realty, Inc., 915 F.2d 777 (1st Cir. 1990); Ellert v. University of Texas, at Dallas, 52

---

[1] Citations to "Opp." herein shall refer to Ellerth's Brief in Opposition to Burlington's Petition for Certiorari.

F.3d 543 (5th Cir. 1995); Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987); and Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987). As discussed in Burlington's Petition, each of these cases expressly holds that proof that a supervisor's harassment affected tangible aspects of the plaintiff's employment is a essential element of a *quid pro quo* sexual harassment claim.

The holdings of these cases are inconsistent with Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997) and Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994), each of which holds that *quid pro quo* harassment occurs whenever a supervisor conditions a job benefit or the absence of a job detriment upon an employee's acceptance of sexual advances, and are also inconsistent with the Seventh Circuit's holding in this case that a supervisor's unfulfilled *quid pro quo* threat can, standing alone, form the basis of a *quid pro quo* sexual harassment claim. As stated in Burlington's Petition, this Court should grant certiorari to resolve this split between the circuits.

II. APPLICATION OF A STRICT LIABILITY STANDARD IN *QUID PRO QUO* SEXUAL HARASSMENT CASES CONFLICTS WITH MERITOR

In Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), this Court held that employers should not be held to a standard of "absolute liability" in Title VII sexual harassment cases and that lower court should look to "agency principles" to determine the proper standard of liability. Despite this edict, the Seventh Circuit and virtually all other circuit courts of appeal have held employers strictly liable for *quid pro quo* harassment perpetrated by their

supervisory employees.[2] Because application of a strict liability standard in this and other cases is contrary to this Court's holding in Meritor, this Court should grant certiorari in this case to correct this misapplication of the law.

Ellerth argues that no inconsistency exists between the Seventh Circuit's holding in this case and this Court's holding in Meritor because the standard of employer liability which the Court of Appeals adopted here is grounded not in strict liability, but in the agency principles embodied in the Restatement (2d) of Agency. This contention is simply not supportable. A majority of the Seventh Circuit's en banc panel explicitly rejected the Restatement as a source for determining employer liability in *quid pro quo* sexual harassment cases. (App.[3] 12a-14a; 40a-44a) Writing for a plurality of five justices, Judge Flaum declared:

> Section 228 [of the Restatement] appears to have little relevance in the sexual harassment setting. In my judgment, reliance on the Restatement in this instance is the type of formalism that does not get us far in practice. (App. 12a)

---

[2] In her Brief in Opposition, Ellerth argues in part that the circuits are not in conflict regarding the standard of liability to be applied to *quid pro quo* sexual harassment. (Opp. at 12-15) Burlington has not contended that a conflict exists among the circuits on this issue, but rather that the strict liability standard adopted by the courts of appeal is in conflict with Meritor.

[3] Citations to "App." herein shall refer to the Appendix to Burlington's Petition for Certiorari.

Chief Judge Posner, in his concurring opinion joined by Judge Manion, criticized reliance on the Restatement to determine standards of employer liability even more sharply, stating:

> The judges and lawyers who insist that the Restatement of Agency is the Way are either disingenuous, wishing to conceal the true grounds of decision, or are in the grip of the formalist belief that difficult cases can be decided by teasing out the meaning of words in a text composed with other problems in mind, without need to examine the social policies that the law might be thought to be serving.
>
> * * *
>
> It is time that we threw away the crutch of the Restatement and, recognizing the differences between workplace sexual harassment and the actual subject matter of that antiquated screed, ask as an original matter . . . what the best regime of liability would be for these cases.

(App. at 43a)

The Seventh Circuit chose to apply a strict liability standard to *quid pro quo* sexual harassment cases not because that standard was dictated by the Restatement, but because the court determined that this standard would better serve Title VII's goal of deterrence than a negligence standard. (App. 14a-16a) The fact that other circuits may be basing their standards of employer liability on the Restatement, as Ellerth suggests, only underscores the need for this Court to grant Burlington's Petition in order to clarify the "agency principles" to which it referred in Meritor.

CONCLUSION

Petitioner Burlington Industries, Inc. respectfully requests that this Court grant its petition for a writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals for the reasons stated above.

Respectfully submitted,

JAMES J. CASEY*
MARY MARGARET MOORE
*Counsel of Record
ROSS & HARDIES
150 N. Michigan Avenue
Chicago, Illinois 60601
(312) 558-1000